

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, *et al.*,

Plaintiffs,

v.

Case No. 11-CV-1128

SCOTT WALKER, *et al.*,

Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION
FOR A TEMPORARY RESTRAINING ORDER AND
LEAVE TO FILE SUPPLEMENTAL PLEADING**

INTRODUCTION

Plaintiffs seek leave to file a supplemental pleading and request a temporary injunction on behalf of a new Plaintiff, Andrew Voegele, even though he could easily get an ID for free and have his vote counted under existing procedures, even though the proposed complaint does not actually concern a voting restraint that would be proper for a voting case, and even though they request an election law change for an election that has already occurred. The motion should be denied as improper and without merit.

Plaintiffs do not argue that Mr. Voegele's ballot is being improperly processed under current law. Nor do they argue that he is unable to obtain a free ID in time to have his vote count under existing procedures. Instead, they simply seek to re-litigate prospective injunction issues and change voting procedures *after the election is done*. Their latest attempted bite at the apple

involves a voter who claims that Wisconsin's \$34 driver license fee restricts his right to vote, even though he does not need a driver license to vote and could get a free ID under current procedures in time to have his provisional ballot counted. The Court should deny the motions for multiple reasons: Mr. Voegele can easily get a free ID to have his vote counted under existing law, any dispute he may have over Wisconsin's driver license regulations is not germane to this case, and *Purcell* bars changing voting procedures now.

ARGUMENT

I. The Plaintiffs have no likelihood of success on the merits because Mr. Voegele could get a free ID that is valid for voting in time for his provisional ballot to be counted.

There is no dispute that Mr. Voegele could get an ID in time to make his provisional ballot count. He does not even make a contrary argument, and the Court's analysis could end there. It is well-established in this case, and the related *One Wisconsin* litigation, that anyone can get an ID for voting with a simple trip to the DMV. (Dkt. 287.) If Mr. Voegele has available documents to get a driver license or state ID card, he will get an ID document on the spot. And voting credentials for people who do not have available documentation are currently being sent overnight to ensure that people who

voted provisional ballots, like Mr. Voegele, will get them in time to have their vote counted. (*One Wisconsin*,¹ WDWI 15CV324, Dkt. 312 ¶ 25–27.)

Mr. Voegele’s dispute is over a Wisconsin driver license, not voting. (Dkt. 321-1 ¶ 7.) His desire to not pay the normal fee for a Wisconsin driver license does not implicate his right to vote, because driving is a privilege, not a fundamental right. *Steen v. State*, 85 Wis. 2d 663, 671, 271 N.W.2d 396, 400 (Wis. 1978) (“granting of an automobile license to operate a motor vehicle is a privilege and not an inherent right.”); *State v. Strassburg*, 120 Wis. 2d 30, 39, 352 N.W.2d 215, 220 (Ct. App. 1984) (“operating a motor vehicle on public highways is not an inherent or civil right but is in the nature of a license or privilege.”); *State v. Fisher*, 127 Wis. 2d 560, 378 N.W.2d 295 (Ct. App. 1985) (unpublished) (“driving is a privilege, not a fundamental right”).

His attempt to bootstrap voting rights into his driver license issue is meritless, because a driver license is not required to vote. Many other forms of ID are acceptable, including a completely free state ID.² Mr. Voegele claims that he does not want to pay \$34 to vote, but he does not have to pay \$34 to

¹ Western District of Wisconsin case number 15CV324, *One Wisconsin Institute v. Thomsen*, is referred to herein as *One Wisconsin*.

² A comprehensive list of the many forms of ID that are acceptable is available at <http://www.bringitwisconsin.com/do-i-have-right-photo-id> (last visited Nov. 9, 2016.)

vote. No relief from this Court is necessary for Mr. Voegele to have his vote count for free.

Further, Mr. Voegele is currently in violation of state driving regulations. He alleges that he moved to Wisconsin in August 2016. (Dkt. 321-1 ¶ 2.) He was required by law to apply for a Wisconsin driver license within 60 days of establishing Wisconsin residency. Wis. Admin. Code § Trans. 102.14(4)(b). He apparently has not done that, and does not intend to do so. He cannot obtain an exception from applicable driver license laws through this voting case, particularly because he does not need a driver license to vote.

Because the claim is meritless—and does not, in fact, concern the ability to vote in the first place—the request for an injunction must be denied.

II. Amending the complaint in this voting case, three years after trial, is not appropriate for Mr. Voegele’s driver license regulation dispute.

Mr. Voegele’s complaints are not voting issues: there is no dispute that he could get a free ID in time to have his ballot count. Because his complaint has no proper place in this voting case, his request for leave to file a supplemental pleading should be denied.

Rather, his complaint lies with Wisconsin’s driver license law prohibiting people from holding multiple licenses in multiple states: “The department shall not issue a license to a person previously licensed in

another jurisdiction unless such person surrenders to the department all valid operator's licenses possessed by the person issued by any other jurisdiction." Wis. Stat. § 343.11(1). Mr. Voegele's complaint does not involve substantially the same alleged wrong at issue in this litigation because his is a driver license issue, not a voting issue.

"A new and distinct lawsuit should never be injected into a case by filing a supplemental pleading." *United States v. S. Pac. Co.*, 75 F. Supp. 336, 339 (D. Or. 1947). It makes no sense to inject driver license issues into this voting case at this stage, and courts have declined to allow amendments for new unrelated or tangential claims. *See McCormack v. Hamblin*, No. 12-CV-535, 2013 WL 4776523, at *2 (W.D. Wis. Sept. 5, 2013) (unpublished); *Green v. Walsh*, 21 F.R.D. 15, 19 (E.D. Wis. 1957). If Mr. Voegele has a case here, it is an entirely different one than exists in this five-year-old litigation, which has included a trial and multiple appeals. He *can* get a free ID to have his ballot counted, his driver license claim is not properly part of this case, and the motion to supplement pleadings should be denied.

III. Mr. Voegele’s request would substantially alter election procedures *after the election* contrary to binding precedent under *Purcell*.

There is no dispute that Mr. Voegele’s ballot was processed properly under current law. Indeed, he notes that poll workers even consulted with the Wisconsin Elections Commission. (Dkt. 321-1 ¶ 5.)

What Plaintiffs actually want is for this Court to change election procedures *after the election has occurred*. But it is well-established that this is not allowed. Any change in the electoral process at this stage threatens severe disruption and is therefore disfavored. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). “Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” *Id.* at 4–5.

If election laws should not be changed right before an election, it must follow from *Purcell* that election laws cannot be changed *after the election* to retroactively alter election procedures or counting of votes. There is a real danger of confusion and disruption to the process here because votes have already been reported and counted. Thus, *Purcell*’s mandate to avoid last-minute (and especially belated) changes to election laws bars the new claim.

CONCLUSION

Mr. Voegele's ballot was treated properly under current law, as ordered by the Seventh Circuit. There is no actual voting issue, or likelihood of success on the merits, because Mr. Voegele could easily get a free ID for his ballot to count under existing procedures. In any event, it is too late to change procedures for an election that has already happened. The plaintiffs' requests for a temporary restraining order, and their attempt to shoehorn a driver license dispute into this voting case, should be DENIED.

Dated this 10th day of November, 2016.

Respectfully submitted,

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